FILE COPY

Office - Supreme Court, U. S.
FILED
AUG 27 1947
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM—1947

No. 303

CLARENCE L. MYERS and OTTO L. MYERS, Executors of the Will of Carrie Guggenheim, deceased,
Petitioners,

vs.

NEW YORK STATE TAX COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

LEE MCCANLISS,
Attorney for Petitioners.

JUDICIAL PRINTING CO., INC., 82 BEEKMAN ST., N. Y.—BARCLAY 7—3648-9 182

INDEX

PAGE

Opinions Below 2

Jurisdiction 2

Statutes Involved 2

Summary Statement of the Matter Involved..... 4

A. Nature of the Suit..... 4

B. Summary of the Facts..... 5

Questions Presented 6

Reasons Relied on for Granting the Writ..... 7

Argument 8

I—A provision such as the one in question applicable only to residents is unconstitutional 8

II—The additional New York estate tax in question is a hostile discrimination in violation of the Fourteenth Amendment in that it is based on gross assets and is made to depend upon the situs of the property..... 11

III—The tangible property of the estate of Carrie Guggenheim without the State of New York cannot be subjected to a New York estate tax 12

Conclusion 14

Table of Cases Cited

PAGE

Atlantic and Pacific Tea Co. v. Grosjean, 301 U. S. 412 13

Boyd v. U. S., 116 U. S. 616 8

Colgate v. Harvey, 296 U. S. 404 .....7, 10

County of Santa Clara v. Southern Pac. Ry. Co., 18 Fed. 385 12

Frick v. Pennsylvania, 268 U. S. 473 .....7, 13

Maxwell v. Bugbee, 250 U. S. 525 13

Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389 ..7, 12

Smith v. Loughman, 245 N. Y. 486 .....9, 13

Tilt v. Kelsey, 207 U. S. 43 2

Table of Statutes Cited

Constitution of the United States, Fourteenth Amendment 2, 3, 6, 7, 9, 10

Judicial Code, 237(b), 28 U. S. C. Sec. 344(b) 2

New York Tax Law, sec. 249-n, as amended, Laws 1930, c. 710, par. 1, Laws 1932, c. 322 .....1, 3, 5, 6, 7, 8, 9, 11, 13

Revenue Act of 1926, Sec. 301(b) as amended (44 Stat. 70, 47 Stat. 278) 3

IN THE

Supreme Court of the United States

OCTOBER TERM—1947

No.

CLARENCE L. MYERS and OTTO L. MYERS, Executors of the Will of Carrie Guggenheim, deceased,

Petitioners,

vs.

NEW YORK STATE TAX COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable Fred M. Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari be issued to review a judgment of the Court of Appeals of the State of New York which unanimously affirmed a judgment of the Appellate Division, First Department, of the Supreme Court of the State of New York, which unanimously affirmed an order of the Surrogate's Court, New York County, made and entered August 7, 1945, which fixed, determined and assessed an additional New York estate tax under Section 249-n of the New York Tax Law on the estate of Carrie Guggenheim, deceased.

Opinions Below

The affirmance in the New York Court of Appeals was without opinion (May 29, 1947). Likewise the affirmance in the Appellate Division, First Department, of the New York Supreme Court was without opinion (270 A. D. 923). The opinion of Mr. Surrogate DELEHANTY of the Surrogate's Court of New York County is printed in 185 N. Y. Misc. 606.

Jurisdiction

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code [28 U. S. C. A. 344(b)] which provides for certiorari by this Court to review the judgment of the highest court of a State involving the validity of a State statute on the ground of its being repugnant to the Constitution of the United States. The petitioners' constitutional rights under the Fourteenth Amendment were invoked from the outset in the Surrogate's Court of New York County in their petition and were passed upon adversely in the order of that Court dated August 7, 1945 (R. 3, 9)* which order was affirmed by the Appellate Division, First Department, of the Supreme Court of the State of New York (R. 12) without opinion, and was later affirmed by the Court of Appeals of the State of New York, the highest Court of that State (R. 14). The federal questions were necessarily decided and are properly presented. *Tilt* v. *Kelsey*, 207 U. S. 43 (1907).

Statutes Involved

The statute involved is the Fourteenth Amendment to the Constitution of the United States providing:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of

* All record references are to pages of the record.

> the United States; * * * nor deny to any person within its jurisdiction the equal protection of the laws."

The New York statutes involved are portions of Section 249-n of the N. Y. Tax Law (L. 1930, c. 710, Par. 1) as amended in 1932 (L. 1932, c. 322) reading as follows:

> "Notwithstanding any of the foregoing provisions of this section or any other provision of this article, there shall be imposed upon the transfer of the net estate of every person who at the time of death was a resident of this state, a tax equal to the maximum credit allowable to the estate of such decedent against the United States estate tax imposed with respect thereto, except that proper reduction of the amount of such tax shall be made on account of any real or tangible personal property forming a part of the gross estate of such decedent which is located outside of the state of New York; but the provisions of this paragraph shall in no event have the effect of reducing the tax otherwise imposed by this article."

Section 301(b) of the Revenue Act of 1926, as amended (44 Stat. 70, 47 Stat. 278) which is continued as Section 813(b) of the Internal Revenue Code reads as follows:

> "The tax imposed by subdivision (a) of this section shall be credited with the amount of any estate, inheritance, legacy or succession taxes actually paid to any State or Territory, or the District of Columbia, in respect of any property included in the gross estate (not including any such taxes paid with respect to the estate of a person other than the decedent). The credit allowed by this subdivision shall not exceed 80 per centum of the tax imposed by subdivision (a) * * *."

Summary Statement of the Matter Involved

A. Nature of the Suit

On March 28, 1938 an order was entered in the Surrogate's Court, New York County, N. Y., assessing the New York estate tax on the estate of the late Carrie Guggenheim at $5,677.71 (R. 46). An order was entered in an inheritance tax proceeding in California assessing the California inheritance tax upon the same estate on account of tangible property which the deceased left in California at $18,170.53 (R. 5). Subsequently, in the Federal estate tax proceedings the Federal estate tax upon such estate was fixed at $48,061.17, of which amount the sum of $14,638.91 was fixed as the Federal estate tax under the 1926 Act, of which 80%, or $11,711.13 could be satisfied by showing as a credit the payment of state taxes up to such amount (R. 5, 7).

Thereupon the New York State Tax Commission, the respondent herein, claimed that, since the entire gross estate, wherever located (before liabilities), amounted to $726,650.12, and the gross estate (before liabilities) in New York amounted to $463,947.93, New York was entitled to the same percent (.638475) of the allowable credit ($11,711.13), or $7,477.26 (R. 7). Since the New York estate tax as fixed under the statute, ignoring this provision, was $5,677.71, the Tax Commission claimed an additional tax of $1,799.55 (R. 8).

This additional tax was upheld and assessed against this estate by the Surrogate's Court of New York County by order dated August 7, 1945 (R. 2). On appeal to the Appellate Division, First Department of the Supreme Court of the State of New York, the said order was affirmed without opinion on May 10, 1946 (R. 12). On further appeal being duly taken to the Court of Appeals of the State of

New York, the order of the Appellate Division was affirmed without opinion (R. 14).

It is this additional tax of $1,799.55 which is in question. It is claimed and upheld on the ground that Section 249-n of the New York Tax Law required a New York estate tax on resident estates at least equal the maximum credit allowed by the Federal Tax Act after making an allowance so computed on account of the tangible property outside the state.

B. Summary of the Facts

On January 5, 1933 Carrie Guggenheim died a resident of the City, County and State of New York. On April 8, 1933 letters testamentary were issued to your petitioners (R. 4).

On March 28, 1938 an order was entered in the New York Surrogate's Court assessing the New York estate tax on such estate at $5,677.71 (R. 4). There is no question as to the validity and correctness of this assessment.

Mrs. Guggenheim left tangible property in California and an order was entered in such jurisdiction assessing the California inheritance tax at $18,170.53 (R. 5).

In the Federal estate tax proceedings on a total gross estate (before any deductions) of $726,650.12 the estate tax was fixed at $48,061.17. Of this amount the sum of $14,638.91 was fixed as the Federal estate tax under the 1926 Act. 80% of this (or $11,711.13) could be satisfied by crediting estate taxes paid to the various states. Since the executors had already paid $5,677.71 to the state of New York and $18,170.53 to the state of California, or a total of $23,848.24, your petitioners claimed and took a credit in so far as the Federal estate tax is concerned of the full $11,711.13 (R. 5).

The record shows that while the gross estate for Federal estate tax purposes was fixed at $726,650.12, there were

debts and deductions so that the net for such tax was fixed at $442,778.22. In the same way for the New York estate tax, while the gross estate before any deductions was fixed at $463,947.93 the net estate for such tax was fixed at $341,178.38 (R. 5).

After the conclusion of these tax proceedings the New York State Tax Commission asserted a claim that since this is a *resident* estate, the New York estate tax fixed under the statute at $5,677.71, as above stated, should be increased to the sum of the 80% credit allowed against the Federal tax, or $11,711.13, less only a "proper reduction" on account of the tangible property in California. This claim was based upon Section 249-n of the New York Tax Law which provides that in case of *resident* estates the New York estate tax shall not be less than the maximum credit allowed "except that proper reduction of the amount of such tax shall be made on account of any real or tangible personal property forming a part of the gross estate of such decedent which is located outside of the state of New York" (R. 7).

The New York State Tax Commission then proceeded to claim that since the entire gross estate was fixed at $726,650.12 and since further the gross estate in New York was fixed at $463,947.93, therefore, such percent (.638475) of the allowable Federal credit ($11,711.13) or the sum of $7,477.26 was the minimum New York estate tax, and, therefore, $1,799.55 additional tax was due.

Questions Presented

1. Whether the Fourteenth Amendment to the Constitution of the United States prohibiting the states from making or enforcing laws which shall abridge the privileges or immunities of citizens of the United States permits Section 249-n of the New York Tax Law, as construed in this case by the highest court

of the State of New York, to assess an additional New York estate tax upon estates of residents when no such additional estate tax is assessed against non-residents.

2. Whether the Fourteenth Amendment to the Constitution of the United States prohibiting the abridgement of the privileges or immunities of the citizens of the United States and the denial of the equal protection of the law permits the assessment of an additional estate tax in this case, based upon the proportion of the gross assets in the state, and based further upon the location of the property at the date of death.

3. Whether the Fourteenth Amendment to the Constitution of the United States prohibiting the states from denying to any person within its jurisdiction the equal protection of the laws permits the levy of an additional estate tax using as a basis tangible property situated without the state.

Reasons Relied on for Granting the Writ

1. The federal question, of substance and not heretofore decided by this Court, as to whether the additional tax imposed under Section 249-n of the Tax Law of New York violates the Fourteenth Amendment of the Constitution of the United States, was decided by the Court of Appeals of the State of New York in favor of respondent by holding that it was not a violation of said Amendment.

2. The said Court of Appeals of the State of New York, in this case, decided the same federal question of substance in favor of the respondent herein, which decision is not in accord with the decisions of this Court, including the cases of *Colgate* v. *Harvey*, 296 U. S. 404 (1935); *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389 (1928) and *Frick* v. *Pennsylvania*, 268 U. S. 473 (1925).

The legality of this unusual and peculiar provision of Section 249-n of the New York Tax Law has never before been passed upon. As construed by the highest court of the state of New York this taxing provision is made the basis for assessing a substantial further estate tax in this particular estate.

The statute in question as construed discriminates between residents and non-residents in a most hostile fashion.

As construed, this statute permits the taking into consideration of the tangible property without the state as a basis for claiming and assessing a further New York estate tax in a method never before equalled. It is discriminatory in that it is based upon the gross estate (without any consideration of liabilities or deductions) and is further discriminatory on the basis of whether the property of the deceased is within or without the State and, as stated above, is hostilely discriminatory as between residents and non-residents. As the Court said in the great case of *Boyd* v. *U. S.*, 116 U. S. 616 (1886) at 635:

> "It is the duty of the courts to be watchful for the constitutional rights of the citizens, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"

ARGUMENT

I

A provision such as the one in question applicable only to residents is unconstitutional.

Carrie Guggenheim was a resident of New York at the time of her death (R. 4, 6). Her executors complied with the New York tax statutes, had the New York estate tax fixed, and paid it in the amount of $5,677.71. No question has ever been raised as to its being legally and properly fixed.

Because Mrs. Guggenheim was a resident of New York, the New York State Tax Commission claimed that, by virtue of Section 249-n of the New York Tax Law, they were entitled to a further tax in order to bring the New York estate tax up to the full 80% Federal estate tax credit of $11,711.13, subject only to a "proper reduction" on account of Mrs. Guggenheim having left tangibles in California where her estate had already paid a California inheritance tax of $18,170.53.

No such provision for an additional estate tax is made with respect to non-resident estates. This is an extra or special New York estate tax claimed from resident estates only. For this reason petitioners claim it violates the Fourteenth Amendment to the Constitution of the United States, and is improper.

Smith v. *Loughman*, 245 N. Y. 486 (1927), rehearing denied 247 N. Y. 546, cert. den. 275 U. S. 560, was a case where a non-resident of the State of New York was assessed a New York estate tax of $589.98 on New York real estate, whereas residents in similar circumstances would have paid a New York estate tax of not more than $94.90. The Court held that the Fourteenth Amendment to the Constitution of the United States prevented any such discrimination. Chief Judge CARDOZO, writing for the entire Court, says at page 492:

> "Classification may be supported by many considerations of expediency or fairness and, none the less, may be illegal if it denies to the citizens of any state the privileges and immunities that belong to citizens of another. To put it differently, equality in such circumstances is itself the highest policy, to which other policies must bow. The Constitution so commands. Few of its commands, if any, have had an influence more profound upon the attainment and preservation of the unity of the nation (*Paul* v. *Virginia*, 8 Wall. [U. S.] 168, 180; *Travis* v. *Yale & Towne Mfg. Co.*, 252 U. S. 60, 78, cf. *Hanover Fire Ins. Co.* v. *Carr*, 47 Sup. Ct. 179).

> "By the Tax Law of this State, an act that in any case is one and the same—the transfer of a parcel of real estate by will—is subjected to burdens of taxation that differ fundamentally, and not occasionally or in points of detail, according as the doer of the act is a citizen of one State or another."

And further on page 495:

> "No doubt a taxing system may be upheld though 'occasionally and incidentally' (*Maxwell* v. *Bugbee*, 250 U. S. 525, 543) individuals may suffer. In the case cited the formula of apportionment was framed to produce equality. The court let it stand though there was evidence that in a few instances it resulted in inequality. What was general prevailed over what was unintended and exceptional. The inequalities wrought by this enactment have not been kept within those limits."

Again, in *Colgate* v. *Harvey*, 296 U. S. 404 (1935), the question was presented whether a Vermont income tax could properly exempt income from money loaned within the State and not exempt income from money loaned without the State. In holding against this tax the Court says (p. 426):

> "But, assuming that the state of Vermont is benefited by the exemption, the complete answer is that appellant is a citizen of the United States; and, quite apart from the equal protection of the laws clause, the suggestion is effectively met and overcome, and the fallacy of other attempts to sustain the validity of the exemption here under review clearly demonstrated, by reference to the privileges and immunities clause of the Fourteenth Amendment."

It seems obvious, therefore, that the Fourteenth Amendment is a protection against any such discriminatory additional estate tax as the one in question.

II

The additional New York estate tax in question is a hostile discrimination in violation of the Fourteenth Amendment in that it is based on gross assets and is made to depend upon the situs of the property.

The proportion of the gross assets of the estate of the deceased within the State of New York to the entire gross assets wherever situated is made the basis for this additional New York estate tax.

No account at all is taken of liabilities or deductions. Only gross assets are considered and the situs of such gross assets.

Since the entire gross assets are $726,650.12 and the gross assets within the State of New York are $463,947.93, therefore, it is claimed the same proportion (.638475) of the $11,711.13 maximum credit against the 1926 Federal tax must be paid to the State of New York, or an additional New York tax of $1,799.55.

While the gross estate in New York was $463,947.93, the net estate in New York was only $341,178.38. On the other hand there do not appear to have been any liabilities or deductions against the California estate except the California inheritance tax. But even if the liabilities of the deceased in New York to be paid out of the New York assets had amounted to $300,000, leaving the net assets in New York at $163,947.93, even then, under Section 249-n of the New York Tax Law, New York would have been entitled to the same proportion of the 80% Federal credit allowable.

Again, this tax is based upon a formula which is unequal, whimsical and arbitrary. Under the same formula, if the California property had been valued at one-half of its actual value ($130,000) but with no change at all in the value of the New York property, the New York estate tax would

be computed to be only $5,584.58. Again, if the California property had been doubled in value ($520,000) and still with no change in the value of the New York property, the New York estate tax would have jumped to $10,819.21.

In *Quaker City Cab Co.* v. *Penn.*, 277 U. S. 389 (1928), the Court held unconstitutional a statute levying a tax upon the gross receipts of corporations operating taxicabs. No such tax was imposed on individuals or partnerships engaged in the same business. The Court held that it was discriminatory.

Mr. Justice FIELD, in commenting upon discriminatory taxes in *County of Santa Clara* v. *Southern Pac. Ry. Co.*, 18 Fed. 385 (1883), states the rule clearly at page 399:

> "Unequal taxation, so far as it can be prevented, is, therefore, with other unequal burdens, prohibited by the amendment. * * * It is a matter of history that unequal and discriminating taxation, leveled against special classes, has been the fruitful means of oppressions, and the cause of more commotions and disturbance in society, of insurrections and revolutions, than any other cause in the world."

It seems obvious that this discriminatory classification cannot be supported.

III

The tangible property of the estate of Carrie Guggenheim without the State of New York cannot be subjected to a New York estate tax.

It must be conceded that the State of New York cannot assess an estate tax upon the tangible property which the testatrix left in California. The formula which has been used in this case makes the tangible property in California the basis for this additional tax.

Maxwell v. *Bugbee,* 250 U. S. 525 (1919) is the basis upon which the respondent has justified this assessment in this particular regard. Your petitioners contend that this case is no protection here. And for the following reasons:

In *Maxwell* v. *Bugbee,* 250 U. S. 525 there was a dissent by Mr. Justice HOLMES in which three of his associates joined. This case is recognized to mark the limit. In *Frick* v. *Penn.,* 268 U. S. 473 (1925) the Court says at page 495:

> "The state court cited in support of its view *Maxwell* v. *Bugbee,* 250 U. S. 525, 539. The case is on the border line as is evidenced by the dissent of four members of the court."

The situation with respect to this case was again called attention to in *Atlantic and Facific Tea Co.* v. *Grosjean,* 301 U. S. 412 (1937) at page 425.

Here the statute goes much further than the statute in the *Bugbee* case. The statute here is designed to create inequality, to discriminate. As said of the *Bugbee* case in *Smith* v. *Loughman,* 245 N. Y. 486 (1927) (cert. den. 275 U. S. 560):

> "In the case cited (*Maxwell* v. *Bugbee*) the formula of apportionment was framed to produce equality. The court let it stand though there was evidence that in a few instances it resulted in inequality."

Certainly Section 249-n cannot stand.

CONCLUSION

Where, as here, a State statute as finally construed by the highest Court of the State, works discrimination and injustice, and denies to the citizens of the United States the privileges and immunities to which they are entitled, and the equal protection of the laws, this Court should grant certiorari to review the decision.

Respectfully submitted,

LEE MCCANLISS,
Attorney for Petitioners.

Dated, New York, N. Y.
August 26, 1947.

FILE COPY

Office - Supreme Court
FILED
SEP 18 19
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1947

No. 303

CLARENCE L. MYERS and OTTO L. MYERS, Executors of the Will of CARRIE GUGGENHEIM, deceased,
Petitioners,

vs.

NEW YORK STATE TAX COMMISSION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MORTIMER M. KASSELL,
Counsel for Respondent.

FRANCIS KELLIHER,
With him on this brief.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

INDEX

PAGE

Summary statement of the case 1

POINT I—Petitioners seeks to raise in this Court questions not presented to or passed upon by the New York Court of Appeals 2

POINT II—The questions which petitioners now seek to raise are either not of substance or have heretofore been determined by this Court .. 4

Conclusion 9

TABLE OF CASES CITED.

Clarke v. McDade, 165 U. S. 168 4

Colgate v. Harvey, 296 U. S. 404 5

Frick v. Pennsylvania, 268 U. S. 473 7

Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U. S. 412 8

Harding, Matter of, 279 N. Y. 142 8

Knowlton v. Moore, 178 U. S. 41 6

Lagergren, Matter of, 276 N. Y. 184 8

Lawrence v. State Tax Commission 286 U. S. 276 6

Madden v. Kentucky, 309 U. S. 83 5

Magoun v. Illinois Trust and Savings Bank, 170 U. S. 283 6

Marvin v. Trout, 199 U. S. 212 4

Maxwell v. Bugbee, 250 U. S. 525 ..... 7, 8

Northwestern Bell Telephone Co. v. Nebraska State Railway Commission, 297 U. S. 471 4

Saltonstall v. Saltonstall, 276 U. S. 260 4

Silver v. Silver, 280 U. S. 117 4

Wisconsin v. J. C. Penney Co., 311 U. S. 435 8

II.

Table of Statutes Cited.

	PAGE
Constitution of United States, Fourteenth Amendment	4, 6
Internal Revenue Code, section 813(b)	2
Judicial Code, section 237 (b)	2
Tax Law, section 249-n	1, 2, 3, 5, 6, 8
Tax Law, section 249-p	5
Tax Law, section 249-r	6
Tax Law, section 249-s	6

IN THE

Supreme Court of the United States

October Term, 1947

No. 303

CLARENCE L. MYERS and OTTO L. MYERS, Executors of the Will of CARRIE GUGGENHEIM, deceased,
Petitioners,

vs.

NEW YORK STATE TAX COMMISSION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Summary Statement of the Case

There is no dispute as to the facts in the present case, and the statement of facts contained in the petition for certiorari is not challenged by respondent. However, petitioners' statement so emphasizes details that the broad question is not entirely clear.

This case arose under section 249-n of the Tax Law of the State of New York, which imposes an estate tax measured by the credit allowable against the Federal estate tax

(section 813(b), Internal Revenue Code). The amount of such credit is dependent upon the value of all of decedent's property, wherever situated. Under section 249-n, if all property transferred by a decedent is subject to the taxing jurisdiction of New York, the New York tax so imposed is equal to 100% of the Federal credit. However, if some of such property is not subject to tax by New York, the statute commands that "proper reduction of the amount of such tax shall be made". In such a case, the plan of the statute is to allocate to New York the share of the Federal credit attributable to decedent's New York property.

In the State courts there was argued and decided the proper construction of this statute. Decedent's property subject to tax by the State of New York constituted 63.8475% of all property transferred by decedent. (R. 5.) Accordingly, the order of the Court of Appeals determined, contrary to petitioners' claim, that the New York tax imposed on the transfer of this decedent's New York property by section 249-n of the Tax Law was 63.8475% of the amount of credit allowable against the Federal estate tax.

POINT I

Petitioners seek to raise in this Court questions not presented to or passed upon by the New York Court of Appeals.

The jurisdiction of this Court is invoked under section 237(b) of the Judicial Code, which authorizes review by certiorari of "any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had * * * where is drawn in question the validity of a statute of any State on the

ground of its being repugnant to the Constitution, treaties, or laws of the United States * * *."

The record in the present case wholly fails to show that in the Court of Appeals the validity of section 249-n of the Tax Law was challenged upon any ground under the Constitution of the United States. Much less does it disclose that the particular questions which petitioners seek to raise in this Court were presented to or passed upon by the Court of Appeals.

In their application to the Surrogates' Court, petitioners' only claim with respect to any constitutional infirmity in section 249-n of the Tax Law was "that any construction of the law which would authorize further or additional taxes in the present case would be unconstitutional." (R. 6.) The order of the Surrogates' Court made upon such application, recites that the attorneys for petitioners had "contended that the statute in question should not be construed to require the payment of any further tax and that to so construe it would render it in violation of the Constitution of the United States and of the Fourteenth Amendment thereto * * *." (R. 3.) In his opinion, the Surrogate said that application of the formula set forth in section 249-n of the Tax Law "invades no constitutional rights." (R. 9.) This is the full extent of the record disclosure as to what question or questions under the Constitution of the United States were presented to and passed upon by the Surrogates' Court.

There is nothing to indicate that any constitutional question was considered either by the Appellate Division or the Court of Appeals, no opinion having been written by either court. The notices of appeal to said courts (R. 2 and 10-11), and order of affirmance by the Appellate Division (R. 12) and the remittitur of the Court of Appeals (R. 14-15) are

entirely devoid of any indication as to what question or questions, if any, under the Constitution of the United States were presented to or passed upon by them.

Even if it be assumed that petitioners made the same contention in the Court of Appeals as they did in the Surrogates' Court, it should be noted this Court has more than once held that a vague and general assertion of repugnancy to the Fourteenth Amendment is insufficient to raise a Federal question.

Clarke v. *McDade,* 165 U. S. 168;
Marvin v. *Trout,* 199 U. S. 212.

It is likewise well settled by the decisions of this Court that it will review only the specific questions arising under the Constitution of the United States which have been considered and passed upon by the State court whose judgment is sought to be reviewed.

Saltonstall v. *Saltonstall,* 276 U. S. 260;
Silver v. *Silver,* 280 U. S. 117;
Northwestern Bell Telephone Co. v. *Nebraska State Railway Commission,* 297 U. S. 471.

Accordingly, the questions which petitioners now seek to present for determination by this Court not having been properly raised in the Court of Appeals, the petition for certiorari should be denied.

POINT II

The questions which petitioners now seek to raise are either not of substance or have heretofore been determined by this Court.

The petition for certiorari states three questions for determination by this Court. The first of these is whether

section 249-n of the Tax Law of the State of New York abridges the privileges or immunities of citizens of the United States. It is asserted that such an abridgement exists because said section imposes on New York residents an estate tax measured by the credit allowable against the Federal estate tax, while no such tax is imposed with respect to nonresident estates.

Here petitioners have proceeded upon a false premise. As to both resident and nonresident estates, the amount of the Federal credit is one of the bases of measuring the New York tax. Section 249-p of the Tax Law imposes the New York estate tax on nonresidents. It provides that the tax on the transfer of the nonresident's New York property shall be a fraction of what would be payable if the decedent had died a resident of New York. The first step in computing such nonresident tax is to "ascertain the amount of tax which would be payable * * * if the decedent had died a resident of this state." The resident tax is dependent on the amount of the credit allowable against the Federal estate tax. Hence, the nonresident tax also is dependent on the amount of such credit.

Furthermore, with respect to a controversy between a state and one of its own citizens, it is well established that the privileges and immunities protected by the Fourteenth Amendment are only those arising out of national citizenship, not those created or granted by the state itself.

> *Madden* v. *Kentucky*, 309 U. S. 83 (overruling *Colgate* v. *Harvey*, 296 U. S. 404, relied upon by petitioners).

The privilege of transmitting property at death is not one arising from national citizenship; instead, it is one subject to and derived from the power of the state exclusively.

(*Magoun* v. *Illinois Trust and Savings Bank*, 170 U. S. 283; *Knowlton* v. *Moore*, 178 U. S. 41).

Nothing in the Fourteenth Amendment prevents a state from taxing estates of resident decedents on any reasonable basis, regardless of the basis employed for taxing nonresidents. (*Lawrence* v. *State Tax Commission*, 286 U. S. 276.)

Respondent submits therefore that the first question stated in the petition for certiorari is not a question of substance.

The second and third questions stated in the petition for certiorari are so interrelated that they may conveniently be discussed together. In substance, petitioners assert that questions exist as to whether a state may impose an estate tax, with respect to the transfer of property subject to its jurisdiction, equal to a proportionate part of what the tax would be if all of decedent's property were subject to the taxing jurisdiction of such state. They assert that the "equal protection" clause and the "privileges and immunities" clause of the Fourteenth Amendment prevent the imposition of a tax so computed.

It should be noted that section 249-n of the Tax Law does not, either in terms or in effect, impose any tax on the transfer of tangible property in another state. It provides that the tax is imposed "upon the transfer of the net estate of every person who at the time of death was a resident of this state." By the terms of sections 249-r and 249-s real property and tangible personal property situated outside the State of New York are specifically excluded in determining the "net estate." The effect of the statute, therefore, is to impose a tax only on the transfer of property subject to the jurisdiction of New York but at a rate determined by considering all of decedent's property wherever situated.

Contentions identical with those made here by petitioners were disposed of by this Court in *Maxwell v. Bugbee*, 250 U. S. 525. This Court said (at page 539):

> "It is not to be disputed that, consistently with the Federal Constitution, a State may not tax property beyond its territorial jurisdiction, but the subject-matter here regulated is a privilege to succeed to property which is within the jurisdiction of the State. When the State levies taxes within its authority, property not in itself taxable by the State may be used as a measure of the tax imposed. * * * In the present case the State imposes a privilege tax, clearly within its authority, and it has adopted as a measure of that tax the proportion which the specified local property bears to the entire estate of the decedent. That it may do so within limitations which do not really make the tax one upon property beyond its jurisdiction, the decisions to which we have referred clearly establish. The transfer of certain property within the State is taxed by a rule which considers the entire estate in arriving at the amount of the tax. It is in no just sense a tax upon the foreign property, real or personal. * * *"

In *Frick* v. *Pennsylvania*, 268 U. S. 473, at pages 495-6, this Court described the statute which it had previously considered in *Maxwell* v. *Bugbee, supra*, in the following language:

> The state statute, described according to its essence, provided for a tax graduated in rate according to the value of the entire estate, and required that where the estate was partly within and partly without the State the transfer of the part within should bear a proportionate part of what according to the graduated rate would be the tax on the whole."

This is exactly the effect of the New York estate tax measured by the Federal credit; the part of decedent's estate within the State of New York bears merely a proportionate part of what would be the tax on the whole estate if the whole were subject to the jurisdiction of New York.

The principle of *Maxwell* v. *Bugbee* has been consistently approved by this Court.

Great Atlantic & Pacific Tea Co. v. *Grosjean*, 301 U. S. 412;

Wisconsin v. *J. C. Penney Co.*, 311 U. S. 435.

Petitioners assert that a "hostile discrimination" results because the values of "gross assets" are used in computing the tax under section 249-n of the Tax Law. However, no indication is given as to who or what receives hostile or discriminatory treatment by virtue of such computation.

Contrary to such assertion, this Court has approved the use of "gross assets" in a statute designed to accomplish the same purpose as section 249-n. *(Maxwell* v. *Bugbee, supra.)*

In any event the effect of using "gross assets" is merely to prorate all deductions against all property transferred by decedent whether subject to the taxing jurisdiction of the state or otherwise. (Cf. *Matter of Lagergren*, 276 N. Y. 184; *Matter of Harding*, 279 N. Y. 142.) The use of "net estate" values, apparently suggested by petitioners, would produce hopeless confusion and a distorted result, because some deductions would be taken into consideration two or more times (once by each taxing jurisdiction), while as to others the contrary would be true. As an example, the use of "net estate" values in the present case would have resulted in a higher New York tax than the one here questioned, for the New York net estate ($341,178.38—R. 5) is more than 77% of the Federal net estate ($442,778.22—R. 7).

Respondent submits that the second and third questions presented by the petition have heretofore been answered by this Court.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

MORTIMER M. KASSELL,
Counsel for Respondent,
State Office Bldg.,
Albany, N. Y.

FRANCIS KELLIHER,
With him on this brief.